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Supreme Court of the United States

OCTOBER TERM, 1948

O. G. HARP, doing business as O. G. HARP POULTRY AND EGG COMPANY,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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May, 1949.

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No. .....

Supreme Court of the United States

(OCTOBER TERM, 1948)

O. G. HARP, doing business as O. G. HARP POULTRY AND EGG COMPANY,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Justices of the Supreme Court of the United States:

Comes now O. G. Harp, doing business as O. G. Harp Poultry & Egg Company, and respectfully petitions this Honorable Court, to grant a writ of certiorari to review the opinion and decree of the United States Court of Appeals, Tenth Circuit, rendered and entered on the 28th day of March, 1949, in the case lately pending in the said United States Court of Appeals, Tenth Circuit, styled O. G. Harp, doing business as O. G. Harp Poultry & Egg Company, Appellant, v. United States of America, Appellee, being No. 3794, of causes on the docket of the said United States Court of Appeals, Tenth Circuit, affirming the decree of the United States District Court, for the Western Dis-

trict of Oklahoma, in said cause, against the petitioner, and in favor of the respondent herein; which said decree of the United States Court of Appeals, Tenth Circuit, became final on April 26, 1949, by the decree of that Court, and petitioner's petition for re-hearing.

OPINIONS IN THE COURT BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, in said cause of O. G. Harp, doing business as O. G. Harp Poultry & Egg Company (defendant-appellant) v. United States of America (plaintiff-appellee), which petitioner here seeks to have reviewed, is not yet officially reported; but appears on pages 71 to 77, of Transcript of the pending record filed herewith.

The opinion of the District Court is reported in 80 Federal Supplement, at page 236, and is found on pages 11 to 18, of the Transcript of Record filed herein.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On July 25, 1947, in a proceeding before the Wage-Hour and Public Contracts Divisions of the United States Department of Labor, an administrator rendered a decision, finding that O. G. Harp, doing business as O. G. Harp Poultry & Egg Company, had breached certain contracts with the Government, covered by the Public Contracts Act (41 USCA, 35-45; 49 Stat. 2036); by the employment of girls under the age of 18 years, in violation of the terms of the Act, and the terms of exemptions thereto, issued

by the Secretary of Labor, under the Authority of the Act, and was liable in liquidated damages to the United States, in the sum of $6,970.00 (R. 62-69). No petition for review by the Secretary of Labor was filed.

On September 8, 1947, the United States filed an action in the United States District Court, Western District of Oklahoma, against petitioner to recover the $6,970.00, found due by the Administrator (R. 1-3).

The complaint alleged that by reason of the findings and decision of the administrator, petitioner was liable and indebted to the United States of America, in the sum of $6,970.00, which he had failed to pay, and did not allege as a fact, any willful breach of any contract.

The complaint was founded solely upon the decision of the Administrator (R. 1-3).

Petitioner filed a motion to dismiss, which was overruled (R. 4-5).

One of the points relied on by petitioner in its appeal to the United States Court of Appeals, was the error of the trial court in overruling the motion to dismiss the complaint (R. 20).

The opinion of the United States Court of Appeals, Tenth Circuit, does not rule upon or mention the action of the trial court overruling the motion to dismiss the complaint (R. 71-77).

In its petition for re-hearing, before the United States Court of Appeals, petitioner called the attention of the Court to the fact that the motion to dismiss the complaint

should have been sustained by the trial court, for failure to state a claim, upon which relief could be granted (R. 78).

The petition for re-hearing was denied, without opinion (R. 79-80).

After the motion to dismiss the complaint was overruled, petitioner answered, denying that any contract provision had been knowingly of willfully breached, and denying that he had knowingly and willfully employed any minor under 18 years of age, in violation of law, and pleading, among other defenses, the limitation periods prescribed by the Portal to Portal Pay Act, Sec. 255, Title 29, USCA, 61 Stat. 84-87.

Respondent filed a motion for summary judgment (R. 10-11), which was sustained by the trial court (R. 18).

Petitioner was not permitted to introduce any evidence in support of the defenses, pleaded in his answer, the trial court holding that the findings in the proceeding before the Administrator were conclusive (R. 18).

One of the points relied on by petitioner in its appeal to the Court of Appeals, was that the trial court erred in rendering summary judgment, and in holding the findings of fact of the Administrator to be conclusive (R. 20).

The Court of Appeals, in its opinion, held that the findings of the Administrator were conclusive (R. 76-77).

The Court of Appeals also held that the action was not barred by Sec. 6 of the Portal to Portal Pay Act, 29 USCA, 255; 61 Stat. 84 (R. 75-76).

On petition for re-hearing it was urged by petitioner that the United States Court of Appeals had erroneously

construed the Public Contracts Act, and the Portal to Portal Pay Act (R. 78).

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Section 240, of the Judicial Code, as amended by Act of February 13, 1925, and that portion of Subsection (b) of Paragraph Five (5) of Rule Thirty-eight (38), of Revised Rules of the Supreme Court of the United States, made in pursuance thereof, *viz*:

> "Where a Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court."

This suit was brought by the United States, in the United States District Court, Western District of Oklahoma, and involved an amount in excess of $3,000.00 (R. 1 to 3).

The jurisdiction of the District Court rests upon Section 41, (1) 28 USCA, 36 Stat. 1091.

The opinion of the United States Court of Appeals, Tenth Circuit, was filed March 28, 1949 (R. 71).

Petition for re-hearing was filed within the time allowed under the rules of said court, and denied, and final decree was entered April 26, 1949 (R. 79).

QUESTIONS PRESENTED

The questions presented by petitioner's petition herein, for writ of certiorari, are:

1. Did the United States Court of Appeals, err, in upholding the action of the trial court, in rendering summary judgment against petitioner?

2. Did the United States Court of Appeals, err, in upholding the action of the trial court, in overruling the motion of the petitioner to dismiss the complaint for failure to state a claim?

3. Did the United States Court of Appeals, err, in holding that the action was not barred by the limitation period prescribed by the Portal to Portal Pay Act?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case presents important questions never before decided by this Court, in the administration and enforcement of the Public Contracts Act, and in the interpretation of the limitation provisions of the Portal to Portal Pay Act.

The questions are:

1. Are the findings of the administrator of the Wage-Hour and Public Contracts Division of the Department of Labor, conclusive in an action at law, brought by the United States, to recover liquidated damages against the contractor, under the Public Contracts Act?

2. Does a complaint, which relies entirely, upon the findings and decision of an administrator, in a Public Contracts proceeding, before him, state a cause of action for liquidated damages, under the Public Contracts Act?

3. Are state statutes of limitation, made applicable to suits brought by the United States for liquidated

damages under the Public Contracts Act, by the limitation provisions of the Portal to Portal Pay Act, same being Sec. 255, Title 29, USCA?

These questions have never been decided so far as this Court is concerned, and are important to the administration; and application of both the Public Contracts Act and the Portal to Portal Pay Act.

Questions relating to the administration of Public Contracts Act, have heretofore been deemed by this Court, of sufficient importance to justify the granting of certiorari.

See:

—*Endicott-Johnson* v. *Perkins*, 317 U. S. 507, 87 L. Ed. 424;

Perkins v. *Lukens Steel Co.*, 308 U. S. 113, 84 L. Ed. 115.

The Public Contracts Act provides that liquidated damages may be recovered in suits brought in the name of the United States, by the Attorney General.

—Sec. 36, Title 41, USCA, 49 Stat. 2037.

If the findings and decision of the Administrator are conclusive in such action, a Public Contractor is deprived of all right to a jury trial, in such actions.

An action for breach of contract, is a suit at common law, triable to a jury, and the right to a jury trial, where the amount in controversy exceeds $20.00, is protected by the Seventh Amendment to the United States Constitution.

It is respectfully submitted that in holding that the findings of the Administrator in this case, were final and conclusive, the Court of Appeals for the Tenth Circuit, has given the Public Contracts Act, an interpretation which would deprive contractors, whose contracts are governed by the terms of the Public Contracts Act, of the right to a jury trial, in civil actions, brought by the Government to recover liquidated damages for breach of contract, contrary to the intent of Congress; and in violation of the guaranty of the right to a jury trial, contained in the Seventh Amendment to the United States Constitution.

It is also suggested that the United States Court of Appeals, has erroneously interpreted the Portal to Portal Pay Act, as prescribing one period of time for the bringing of actions, under the Fair Labor Standards Act, and as prescribing a different and longer period of time, for the bringing of actions under the Public Contracts Act, which interpretation results in a lack of uniformity not intended by Congress, and inconsistent with the purposes of the Portal to Portal Pay Act.

SPECIFICATIONS OF ERROR

Petitioner says that the United States Court of Appeals, Tenth Circuit, has erred:

1. In upholding the trial court's action in rendering summary judgment against petitioner.

2. In upholding the trial court's action overruling the Motion of Petitioner to dismiss the complaint, for failure to state a claim.

3. In holding that the action was not barred by the limitation periods prescribed in the Portal to Portal Pay Act.

PRAYER

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals, Tenth Circuit, to the end that said opinion and decree of said United States Court of Appeals, Tenth Circuit, in said cause of O. G. Harp, doing business as O. G. Harp Poultry & Egg Company, Appellant v. United States of America, Appellee, No. 3794, be reviewed by this Court, as provided by law; and that upon such review, said decree be reversed, and petitioner have such other relief as to this Court may seem appropriate.

MARK GOODE,
Counsel for Petitioner.

JOHN L. GOODE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, in said cause of O. G. Harp, doing business as O. G. Harp Poultry & Egg Company (plaintiff-appellant) v. United States of America (defendant-appellee), which petitioner here seeks to have reversed, is not yet officially reported; but appears on pages 71 to 77, of the Transcript of the Printed Record filed herein.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in the petitioner's petition for writ of certiorari, and in the interest of brevity, are not repeated here. Reference will be made to such facts, on points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERRORS TO BE URGED

The United States Court of Appeals, for the Tenth Circuit, in its said opinion in said cause, erred:

1. In upholding the trial court's action in rendering summary judgment against petitioner.

2. In upholding the trial court's action overruling the Motion of Petitioner to dismiss the complaint, for failure to state a claim.

3. In holding that the action was not barred by the limitation periods prescribed in the Portal to Portal Pay Act.

SUMMARY OF THE ARGUMENT

I.

Actions to recover liquidated damages under the Public Contracts Act, are actions for breach of contract, and the defendants are entitled to a jury trial, in such actions, where the amount in controversy exceeds $20.00.

In holding that the findings of the Trial Examiner, are conclusive, in this case, the United States Court of Appeals, has given the Public Contracts Act, an erroneous interpretation which, if followed, would deny defendants the right to a jury trial, in civil actions, brought by the United States, to recover liquidated damages, under the Act, a result never intended by Congress.

Interpretations or constructions which cast serious doubts upon the constitutionality of an act of Congress, ought to be avoided by the courts, if it is reasonably possible to do so.

II.

An action for liquidated damages, under the Public Contracts Act, is an action for breach of contract, and the breach of contract should be pleaded.

The Complaint did not plead anything except the decision of the Administrator. No cause of action arose upon the decision of the Administrator. The Complaint, therefore, did not state a cause of action and the United States Court of Appeals erred in upholding the action of the trial court in overruling the Motion of Petitioner to Dismiss the Claim, for failure to state a claim.

III.

By the limitation periods of the Portal to Portal Pay Act, Congress intended to prescribe uniform periods of time for the bringing of actions for liquidated damages, under the Public Contracts Act, as well as for the bringing of other actions, under the Fair Labor Standards Act, and Davis-Bacon Act.

The decision of the United States Court of Appeals, that this action is not barred by limitations, is based upon a construction of the Portal to Portal Pay Act, which results in a lack of uniformity, inconsistent with the purposes of the Act.

State Statutes of Limitation were by necessary implication, made applicable to actions brought by the United States, for liquidated damages, under the Public Contracts Act, and the action was barred as to most of the damages claimed, if not all, by the applicable limitation statutes of Oklahoma.

ARGUMENT

I.

The Petitioner has been deprived of the right to introduce evidence, showing that he had not breached any contracts. The trial court rendered summary judgment against him upon the theory that the findings of the Administrator were conclusive, as to questions of both liability and damage (R. 11-18).

The United States Court of Appeals, Tenth Circuit, affirmed the decision of the trial court, likewise holding

that the findings of the Administrator were conclusive (R. 76-77).

Under the Public Contracts Act, the recovery of liquidated damages when not withheld, is to be by suit brought by the Attorney General. Sec. 36, Title 41, USCA.

The recovery of liquidated damages by suit is not an administrative function of the Secretary of Labor, under the Act.

The suits brought by the Attorney General to recover liquidated damages, are suits for breach of contract, and rest upon the theory of contractual obligation.

An action for breach of contract is a suit at common law, triable to a jury.

> —*Snell* v. *Niagara Paper Mills,* New York Court of Appeals, 86 N. E. 460.

By the Seventh Amendment to the United States Constitution, the right to a trial by jury, in suits at common law, where the value exceeds $20.00, is guaranteed. Such rights should be jealously guarded by the courts.

> —*William Jacob* v. *City of New York,* 315 U. S. 752-758, 86 L. Ed. 1168.

The Seventh Amendment preserves the right of jury trial, against any infringement by any department of the Government.

> —*Smith* v. *American National Bank* (C. C. A. 8th Cir. Mo.) (1898), 89 Fed. 832.

The inquiry made by the Secretary of Labor, under the Public Contracts Act, to determine whether breaches

of contract have occurred, and the amount of liquidated damages due, is for the guidance of administrative officers.

—*Perkins* v. *Lukens Steel Co.*, 315 U. S. 113, 84 L. Ed. 115.

The imposition of administrative sanctions is provided for by the Public Contracts Act, such as withholding of awards by black listings, cancellation of existing contracts, and withholding of payments due on other contracts.

—Secs. 36 and 37, Title 41, USCA.

While the Public Contracts Act, Sec. 39, Title 41, USCA, provides that the findings of the Secretary or his representative, shall be conclusive, upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States, this provision is intended to apply only to the action of Administrative Officers of the Government, and to suits instituted for the purpose of enjoining, avoiding or seeking relief from the imposition of the administrative sanctions, such as black-listing, cancellation of contracts, or withholding of payments and other similar administrative Acts.

Congress did not intend to make the findings of the Secretary conclusive in an action at law, brought by the Attorney General for breach of contract, because such conclusion would cast grave doubts upon the constitutionality of the Act.

A statute which destroys a substantial and essential feature of a jury trial, abridges the right to a jury trial, guaranteed by the Constitution.

—*American Publishing Company* v. *Fisher*, 116 U. S. 464, 41 L. Ed. 1079.

The power to determine compensation for improvements, involved in a suit at common law, cannot be vested by Legislative action, in appraisers or commissioners.

—*Hamilton Bank* v. *Dudley,* 2 Pet. 492, 7 U. S. (L. Ed.) 496.

The essence of trial by jury, is that controverted facts, shall be decided by a jury.

—*People* v. *Hickman,* 204 Calif. 370, 268 Pac. 912.

The constitutional guaranty means that all issues of fact, arising in such cases, shall be tried by a jury.

—*Simmons* v. *Morrison* (1898), 13 App. D. C. 164.

Statutes should be construed, if fairly possible, to avoid grave doubts as to constitutionality.

—*United States* v. *Jin Fuey Moy,* 241 U. S. 399-402, 60 L. Ed. 1064;

Crowell v. *Benson,* 285 U. S. 61-63, 76 L. Ed. 619;

Missouri Pacific Railroad Company v. *Byrd J. Boone,* 270 U. S. 464, 70 L. Ed. 689;

United States ex rel., Atty. Gen. v. *Delaware & H. Co.,* 213 U. S. 366, 407, 408;

Panama Railroad Company v. *Andrew Johnson,* 264 U. S. 390, 68 L. Ed. 754;

Robert H. Lucas v. *Kate Halloway Alexander et al.,* 279 U. S. 573, 49 Sup. Ct. Rep. 426.

Congress has not expressly said, in the Public Contracts Act, that the findings of the Secretary shall be con-

clusive, in actions brought by the Attorney General, to recover liquidated damages, and the Act should not be interpreted to so read.

—*Cook* v. *Des Moines Union Ry. Co.* (D. C. Iowa, 1936), 16 Fed. Supp. 810.

II.

The Complaint did not state a cause of action for breach of contract. No cause of action arises upon the decision of the Administrator. The cause of action is founded upon breach of contract. The decision of the Administrator is not made prerequisite to the bringing of an action for liquidated damages under the Public Contract Act, by the Attorney General.

The decision of the Administrator is not a judgment.

The Complaint resting solely upon the decision of the Administrator, did not therefore state a cause of action or a claim upon which relief could be granted.

III.

By the passage of the Portal to Portal Pay Act, Congress intended to remedy certain evils arising through the assertion of claims, under the Fair Labor Standards Act, and Public Contracts Act. Sec. 251, Sub-Division A, Title 29, USCA, of the Portal to Portal Act, provides:

> "The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare,

essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act."

Congress intended to prescribe a uniform statute of limitations by the Portal to Portal Act, which should be applicable to actions for liquidated damages, under the Public Contracts Act, as well as to actions brought under the Fair Labor Standards Act.

The United States is the only party who could bring an action for liquidated damages, under the Public Contracts Act. The limitation period prescribed by the Portal Act, were therefore, intended to apply to actions brought by the United States. The trial court so found (R. 13-14).

The limitation periods prescribed by the Portal Act, are as follows:

—Title 29, USCA, Sec. 255:

"Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

"(a) If the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

"(b) If the cause of action accrued prior to May 14, 1947—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period

prescribed by the applicable State Statute of limitations: and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

"(c) If the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after May 14, 1947, unless at the time commenced it is barred by an applicable State Statute of limitations."

By necessary implication, State Statutes of Limitation were made applicable to actions brought by the United States, by the above provisions.

If State Statutes of Limitation are not made applicable, by the Portal to Portal Act, to actions brought by the United States, the result would be that there would either be no limitation period for the bringing of actions for liquidated damages, under the Public Contracts Acts, by the United States, or there would be one period for bringing of actions by private individuals, and another and different period for the bringing of actions by the United States.

Such lack of uniformity would not be consistent with the expressed intent of Congress to remedy existing evils, with respect to the bringing of actions under the Public Contracts Acts, as well as under other Acts enumerated.

If the State Statutes of Limitation of Oklahoma, were applicable to the case at bar, the present action was barred to the extent of most—if not all—of the damages claimed by the Government.

The United States Court of Appeals erroneously held that the State Statutes were not made applicable by the Portal Act (R. 75-76).

IV.

It is respectfully submitted that this Honorable Court should grant certiorari herein, and upon a hearing of this cause, reverse the judgments of both the United States Court of Appeals, Tenth Circuit, and the United States District Court, for the Western District of Oklahoma.

Respectfully submitted,

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May, 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 85

O. G. HARP, DOING BUSINESS AS O. G. HARP POULTRY AND EGG COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Western District of Oklahoma (R. 11–18) are reported in 80 F. Supp. 236. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 71–77) is reported in 173 F. 2d 761.

JURISDICTION

The judgment of the Court of Appeals was entered March 28, 1949 (R. 77). Petitioner's petition for rehearing was denied by an order entered on April 26, 1949 (R. 79–80). The petition for certiorari was filed May 27, 1949. Petitioner apparently intended by reference to

"Section 240, of the Judicial Code, as amended by Act of February 13, 1925" (repealed by c. 646, sec. 39, 62 Stat. 992, effective September 1, 1948) to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provision in Section 5 of the Walsh-Healey Public Contracts Act that the Department of Labor's findings of fact as to breach or violation of a representation or stipulation required by the Act "if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" is applicable to suits brought by the United States under Section 2 of the Act to recover liquidated damages provided in the Act for breach of such representations or stipulations.

2. Whether the Act, as interpreted by the courts below, deprives defendant of the right to trial by jury in violation of the Seventh Amendment to the Constitution.

3. Whether Section 6 (c) of the Portal-to-Portal Act of 1947, providing a grace period of one hundred and twenty days for instituting suit on a then accrued cause of action "unless at the time commenced it is barred by an applicable State statute of limitations," operates, in a suit by the United States, to invoke without benefit of the grace period a state statute of limitations in existence prior to the enactment of the Portal

Act but admittedly not theretofore applicable to the Government.

STATUTES INVOLVED

Provisions of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35–45) and of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. I, 251–262) are involved here. The pertinent provisions are printed in the Appendix *infra*.

STATEMENT

After a full administrative hearing instituted and conducted in accordance with Sections 4 and 5 of the Walsh-Healey Public Contracts Act, and the Rules of Practice promulgated thereunder,[1] before a trial examiner of the United States Department of Labor, a report (R. 46–62) was filed by the trial examiner on November 21, 1946. In this report, the examiner found that petitioner was liable for liquidated damages under Section 2 of the Act in the sum of $13,030 by reason of petitioner's knowing employment of certain minors during the years 1943–1945 in the performance of Government contracts, contrary to the requirements of those contracts and in violation of the Act. Petitioner took exceptions to those findings, and on July 25, 1947 the Adminis-

[1] Codified June 29, 1945, in the Code of Federal Regulations, 41 CFR, 1945 Supp., sec. 203 *et seq.* (10 F. R. 8136, revised 11 F. R. 14493).

trator of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor filed his decision (R. 62–69) upholding the trial examiner's finding that the Act and the contract stipulations had been violated, but concluding that the amount due as liquidated damages was only $6,970. Petitioner did not seek to have this decision reviewed by the Secretary of Labor, and under the Rules of Practice it became final.

Petitioner failed to pay the amount thus found to be due, and, in accordance with Section 2 of the Act, this action to enforce the Administrator's decision was filed in the district court on September 8, 1947 (R. 3). Petitioner moved to dismiss the complaint for failure to state a claim on which relief could be granted (R. 4). The motion was denied (R. 5). After answer was filed (R. 5–10), the Government moved for summary judgment, filing a certified copy of the administrative proceedings and the findings based thereon (R. 10–11). No demand for jury trial was made by petitioner. The district court reviewed in detail the evidence contained in the administrative proceedings on which the administrative findings were based, and concluded that the findings were supported by a preponderance of the evidence, that by reason of Section 5 of the Act those findings were therefore conclusive, and that such findings of fact were adequate to support the claim for summary judgment notwithstanding

petitioner's contention that the statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 barred recovery. Accordingly, judgment was entered for the Government (R. 11–18).

The Court of Appeals affirmed (R. 71–77). The question of petitioner's right to a jury trial was then first raised in his petition for a rehearing, which was denied (R. 78–80).

ARGUMENT

1. The petition does not dispute the conclusion reached by both of the courts below that the preponderance of the evidence in the record of the administrative proceedings supports the findings of fact made by the Administrator (R. 18, 77). It contends, rather, that the statutory provision that such findings "if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" (Section 5) is restricted to ancillary administrative proceedings and other types of suits and is inapplicable to an action to recover liquidated damages under Section 2 (Pet. 14). But no such restriction appears in the statute's terms, and the whole structure of the Act forbids such a limited application of the provisions of Section 5.

As pointed out in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 507, the determination of the issue of violation of the Public Contracts Act is "primarily the duty of the Secretary." Sec-

tion 4 of the Act authorizes and directs the Secretary of Labor "to administer the provisions of this Act", "to prescribe rules and regulations with respect thereto", and "to make investigations and findings" as may be necessary to carry out these functions. Section 5 provides for the holding of administrative hearings "on complaint of a breach or violation of any representation or stipulation." It directs the Secretary to "make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" and authorizes the Secretary "to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act." Plainly, these provisions contemplate and authorize a prior administrative determination before court enforcement, and envisage all judicial proceedings as integrated with and supplementary to the Secretary's primary power and duty to administer and enforce the Act.

Since the only provisions for judicial enforcement of the terms of the statute are contained in Section 2, it seems evident that the requirement in Section 5 that the Secretary's finding "shall be conclusive in any court" (if supported by a

preponderance of the evidence) must relate, if it is to have the substantial scope clearly prescribed by the Act, to the court actions contemplated by Section 2. Petitioner's contrary contention is predicated on the erroneous assumption that an action under Section 2 is simply one for the breach of a contract unrelated to the statutory requirements and purposes (Pet. 13). But, obviously, Section 2 does not stand alone, and the statute cannot be considered in segments, but must be read as a whole. Section 2, containing the statutory provisions for enforcement in the courts, is correlated with the rest of the Act and infused with the same aims and purposes.[2]

2. The argument that to give effect to the statutory provision as it is written violates petitioner's constitutional right to a jury trial apparently overlooks the fact that the Seventh Amendment's provision is expressly restricted to "suits at common law." The Government's right of action for liquidated damages for employment of minors is plainly a special right of action created by statute and not a suit at common law. The decisions of this Court in *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 48, and *Block* v. *Hirsh,*

[2] It has been the consistent administrative practice of the Department of Labor to make an administrative determination before suit is brought under Section 2. See fn. 4, *infra*, p. 9.

256 U. S. 135, 158, therefore are controlling here.[3]

3. Petitioner's last contention is that Section 6 (c) of the Portal-to-Portal Act of 1947 bars the relief here sought by invoking without benefit of the grace period a state statute of limitations in existence prior to the enactment of the Portal Act but not theretofore applicable to the Government. While the questions whether Section 6 applies at all to suits by the United States, and, if so, whether the period of limitations runs from the date of the prohibited employment rather than the date of the final administrative determination, are important, we believe the Court of Appeals was correct in holding that determination of these questions is unnecessary to decision of this case. If, however, this Court considers these questions appropriately presented for decision in this case, they are of sufficient importance to warrant consideration by this Court.[4] However, the only

[3] It may be noted that no demand for jury trial was served under Rule 38 (b) or filed under Rule 5 (d) of the Federal Rules of Civil Procedure. Any right thereto that petitioner might possibly have had was, therefore, waived. See Rule 38 (d). *Garland* v. *Garland*, 165 F. 2d 131 (C. A. 10); *McNabb* v. *Kansas City Life Ins. Co.*, 139 F. 2d 591 (C. A. 8); *May* v. *Melvin*, 141 F. 2d 22 (C. A. D. C.); *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173 (C. A. 2).

[4] It is the Government's position that both of these questions should be answered in the negative in a case seeking liquidated damages under Section 2. Though this Court's decisions seem to make it clear that a statute of limitations does not apply to the Government unless the intention to make it apply is express or "clearly manifested" (*United States* v. *Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 125, and

question which the Court of Appeals found it necessary to decide was whether the action "at the time commenced" was "barred by an applicable State statute of limitations," so as to deprive the Government of the 120 days' grace period provided in Section 6 (c) for accrued causes of action. Even were there doubt of the correctness of the decision below, this question does not appear of sufficient importance to warrant review by this Court inasmuch as Section 6 (c) is limited to causes of action which accrued prior to the enactment of the Portal Act and only a very few

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cases there cited; cf. also *United States* v. *Wittek*, No. 473, Oct. Term 1948, decided June 13, 1949), the district court in this case concluded that Section 6 of the Portal Act did apply to actions brought by the Government under Section 2 of the Walsh-Healey Public Contracts Act, but that such an action did not accrue until the Administrator's determination of liability. The consistent administrative interpretation and practice has been that a cause of action under Section 2 does not arise until final administrative determination of liability has been made under Section 5, since the courts cannot give the effect to administrative findings as directed by Section 5 until those findings are made. Consequently, actions have never been brought under Section 2 until administrative proceedings under Section 5 have been completed. This Court has frequently held that statutes of limitations do not begin to run until the cause of action has matured to the point where suit may be instituted upon it. *Woods* v. *Stone*, 333 U. S. 472, 481; *United States* v. *Wurts*, 303 U. S. 414; *Rawlings* v. *Ray*, 312 U. S. 96; *Fisher* v. *Whiton*, 317 U. S. 217; *Cope* v. *Anderson*, 331 U. S. 461. Accordingly, the district court decided in this case that as the cause of action did not accrue until the final administrative determination, none of the periods of limitation urged by petitioner had run when the complaint was filed in the district court less than 3 months later (R. 12–13).

of such cases are still pending. In any event, the decision of the court of appeals on this point is clearly correct. It is settled beyond question by the decisions of this Court "that the United States is not bound by state statutes of limitations." *United States* v. *Summerlin,* 310 U. S. 414, 416; *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry Co.,* 118 U. S. 120; *Stanley* v. *Schwalby,* 147 U. S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *Board of Commissioners* v. *United States,* 308 U. S. 343, 351. Petitioner does not deny that the state statute was inapplicable prior to the enactment of the Portal Act, but argues that the Portal Act made the state statutes immediately applicable so as to cut off even the grace period. But nothing in Section 6 purports to make state statutes applicable which did not theretofore apply; it obviously refers to state statutes of limitations applicable at the time of the enactment of the Portal Act. It seems equally obvious that the sole purpose of the exception from the grace period provided in Section 6 (c) was to make it clear that actions already barred were not to be revived.[5] The construction which

[5] This is made clear by the statement of Representative Gwynne reporting on the conference report of the bill subsequently enacted as the Portal Act (93 Cong. Rec. 4388): "Any cause of action that has accrued prior to the effective date of this act may be brought within 120 days after the act becomes effective, subject, however, to the provision that any cause of action barred by any State statute, whatever the length of it may be, *is not revived.* That action remains barred." [Italics supplied.]

petitioner urges not only distorts the clear language of the statute, but is contrary to the settled principle that statutes of limitations are to be strictly construed in the Government's favor. *United States* v. *Whited & Wheless,* 246 U. S. 552, 561; *Independent Coal Co.* v. *United States,* 274 U. S. 640, 650; *duPont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462; *United States* v. *United Mine Workers,* 330 U. S. 258.

CONCLUSION

In our view, the holding of the Court of Appeals was wholly correct, and no question warranting review is presented. If, however, the Court considers that this case presents the broader questions of the applicability of Section 6 of the Portal Act to Government actions, the Government would not be opposed to the granting of certiorari on these broader issues.

Respectfully submitted.

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JULY 1949.

APPENDIX

Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35–45):

* * * * *

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; * * * Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. * * *

* * * * *

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * * and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor

or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings * * * and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secreary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

* * * * *

Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C. 251–261):

* * * * *

SEC. 6. Statute of Limitations.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages,

unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

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